UNITED MALAYAN BANKING CORPORATION BHD A

v.

ERNEST CHEONG YONG YIN

FEDERAL COURT, PUTRAJAYA B
NIK HASHIM FCJ
[CIVIL APPEAL NO: 03-2-2001 (W)]
27 FEBRUARY 2007

CIVIL PROCEDURE: *Costs - Review - Getting-up fee - Arguing issues of bankruptcy and limitation in Federal Court - Respondent successful in High Court and Court of Appeal - Whether nothing much to prepare in relation to appeal in Federal Court - Award of RM 35,000 - Whether adequate - Rules of the High Court 1980, O. 59 r. 36(5)* C

This was an application by the respondent under O. 59 r. 36 Rules of the High Court 1980 for a review of the deputy registrar's decision awarding him RM35,000 as getting-up fee regarding a certain appeal before the Federal Court. The respondent had resisted the bankruptcy proceedings initiated by the appellant against him and was successful both in the High Court and the Court of Appeal. In the appeal before the Federal Court, the issue that arose was "whether, in respect of the second limb of s. 6(3) of the Limitation Act 1953, no arrears of interest on any judgment shall be recoverable after the expiration of 6 years from the date on which the interest became due". The learned registrar acknowledged that the issue argued upon was complex and novel, but ruled nonetheless that the appellant, and not the respondent, bore the heavy burden of convincing the apex court that the courts below were wrong in their interpretation of the second limb of s. 6(3). The learned registrar hence only awarded RM35,000 as against the respondent's request for RM250,000. Dissatisfied, the respondent sought for a review of the award. D E F G

Held (dismissing the application) H
Per Nik Hashim JCA:

(1) The learned registrar had applied the correct principles in arriving at the figure in question. The sum awarded was not manifestly low or out of proportion to the complexity and novelty of the question posed. In addition, it would not be just to burden the appellant with extra costs, since it could not now recover the judgment debt from the respondent. (para 7) I

A **(2)** In the present case, the bulk of the preparation by counsel would have been at the High Court and the Court of Appeal levels. And since the respondent was successful at both the courts there was little for the respondent to prepare in relation to the appeal in the Federal Court. (para 8)

B

Bahasa Malaysia *translation of headnotes*

Ini adalah permohonan responden di bawah A. 59 k. 36 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk kajian semula keputusan timbalan pendaftar yang mengawardkan RM35,000 kepadanya C sebagai fee getting-up berhubung satu rayuan di Mahkamah Persekutuan. Responden menentang prosiding kebankrapan yang dimulai perayu terhadapnya dan telah berjaya di kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan. Dalam rayuan di Mahkamah Persekutuan, isu yang berbangkit adalah "sama ada, D mengambilkira jejari kedua s. 6(3) Akta Had Masa 1953, tiada tunggakan faedah atas mana-mana penghakiman boleh dituntut selepas tamatnya tempoh enam tahun dari tarikh di faedah tersebut mula menjadi terhutang". Yang arif pendaftar mengakui E bahawa isu yang dihujah adalah rumit dan sesuatu yang baru, namun berpendapat bahawa yang menanggung beban berat untuk menyakinkan mahkamah tertinggi bahawa mahkamah-mahkamah di bawah khilaf dalam interpretasi mereka terhadap s. 6(3) adalah perayu, dan bukannya responden. Yang arif pendaftar dengan itu F hanya mengawardkan RM35,000 sebagai fee getting-up berbanding RM250,000 yang dipohon responden. Tidak berpuas hati, responden memohon untuk kajian semula award.

Diputuskan (menolak permohonan)
Oleh Nik Hashim HMR:

G

(1) Yang arif pendaftar telah menggunapakai prinsip yang betul dalam mencapai jumlah yang diaward. Jumlah yang diaward tidaklah begitu rendah atau terlalu tidak berbaloi berbanding dengan kerumitan dan kenoveltian persoalan yang dikemukakan. H Lagipun, adalah tidak adil untuk terus membebankan perayu dengan kos tambahan memandangkan perayu sudah tidak lagi boleh menuntut hutang penghakiman dari responden.

(2) Dalam kes semasa, sebahagian besar persediaan adalah dibuat di peringkat Mahkamah Tinggi dan Mahkamah Rayuan. Dan, I oleh kerana responden telah berjaya di kedua-dua peringkat tersebut, tidak banyak yang perlu disediakan oleh responden berhubung rayuan di Mahkamah Persekutuan.

Case(s) referred to:
Alsop v. Oxford (Lord) [1833] 1 My & K 564 ***(refd)***
Chan Kok Choon JP v. MBF Finance Bhd [2000] 4 CLJ 453 CA ***(refd)***
Corbett v. Ipoh Tin Dredging Ltd [1936] MLJ 222 ***(refd)***
Diversey (Far East) Pte Ltd v. Chai Chung Ching Chester & Ors (No 2) [1993] 1 SLR 542 ***(refd)***
Gooi Hock Seng v. Chuah Guat Khim [2001] 1 CLJ 583 SC ***(refd)***
Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [2002] 4 CLJ 259 FC ***(refd)***
Lloyds Bank plc v. Ang Cheng Ho Quarry & Ors [1993] 2 CLJ 210 HC ***(refd)***
Starlite Ceramic Industry Ltd v. Hiap Huat Pottery [1973] 1 MLJ 146 ***(refd)***
United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413 FC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 131
Limitation Act 1953, s. 6(3)
Rules of the High Court 1980, O. 59 rr. 34, 36(5)

Other source(s) referred to:
Malaysian High Court Practice, 2001 desk edition 1, p 1933

For the appellant - R Yogeswari; M/s Che Mokhtar & Ling
For the respondent - SK Liow; M/s Liow & Co

Reported by WA Sharif

JUDGMENT

Nik Hashim FCJ:

[1] This application under O. 59 r. 36 of the Rules of High Court 1980 (the RHC) was brought before me on 13 November 2006 by the respondent to review the decision of the learned deputy registrar for awarding RM35,000 as getting-up fee plus interest 8% for the appeal in this court. Learned counsel for the respondent argued that the issue before the court was complex as it involved the interpretation of two Acts of Parliament namely, the Limitation Act 1953 (the Act) and the Bankruptcy Act 1967, and as such, the amount awarded for the getting-up fee was not reflective of the seriousness of the matter and therefore he suggested the amount be increased to RM70,000. After hearing the parties I dismissed the application with costs of RM1,000 to be paid forthwith to the appellant.

[2] The background facts of the case as reported in [2002] 2 CLJ 413 are that the appellant obtained summary judgment against the respondent on 15 October 1987 but the respondent failed to satisfy the judgment sum. The appellant then filed a bankruptcy notice (the BN) against the respondent on 24 January 1996 for the sum of RM229,563.68 including accrued interest. The senior assistant registrar dismissed the respondent's application to set aside the BN. However, the respondent was successful in his appeal to the judge in chambers who held that the BN was invalid as the act of recovery of the arrears of interest therein, with the issuance of the BN on 24 January 1996, was time-barred by virtue of s. 6(3) of the Act. The appellant's appeal to the Court of Appeal was dismissed and hence the appeal to the Federal Court. The question before the Federal Court was whether, in respect of the second limb of s. 6(3) of the Act, no arrears of interest on any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due. The Federal Court through Abdul Malek Ahmad FCJ (as he then was) answered the question posed, in view of the wording of the second limb of s. 6(3) of the Act, the act of recovery of the arrears of interest in respect of the judgment debt must be made within six years of the judgment date and only up to the date of the act of recovery. There was no formal defect or any irregularity and s. 131 of the Bankruptcy Act 1967 was not applicable. The only error of the appellant was to file the BN out of time.

[3] The learned deputy registrar in dismissing the application to review her own decision under O. 59 r. 34 of the RHC for awarding RM35,000 as getting-up fee grounded her decision as follows:

> ...
>
> Bagi satu isu ini, Responden menghujahkan bahawa mereka berhak untuk mendapatkan kos getting-up sebanyak RM250,000.
>
> ...
>
> Di dalam hal ini, sebagai pegawai penaksir saya bergantung dan "diguided" oleh prinsip-prinsip yang "settled" serta otoriti-otoriti yang telah diputuskan di dalam pemberian kos getting up yakni kos yang sepatutnya diberikan kepada pihak-pihak atas kerja-kerja penyediaan kes yang telah dilakukan.

Saya tidak menafikan bahawa rayuan di hadapan Mahkamah Persekutuan atas soalan yang telah dinyatakan awal tadi adalah merupakan satu soalan novel yang pertama kali timbul di Mahkamah Persekutuan atas penafsiran sebenar peruntukan limb kedua seksyen 6(3) Akta Had Masa 1953 khasnya mengenai tuntutan atas tunggakan faedah atas hutang penghakiman.

Penghakiman Mahkamah Persekutuan di dalam kes ini juga telah menjelaskan dengan nyata kekaburan yang selama ini timbul akibat pembacaan seksyen 6(3) Akta Had Masa 1953 di dalam pengiraan faedah tertunggak bagi tindakan-tindakan penguatkuasaan penghakiman melalui proses kebankrapan yang dimulakan oleh institusi kewangan dan perbankan terhadap penghutang-penghutang penghakiman yang gagal membayar atau menjelaskan hutang-hutang penghakiman mereka.

Semasa perbicaraan rayuan di hadapan Mahkamah Persekutuan, saya berpendapat tugas yang lebih berat adalah ditanggung oleh Perayu yakni untuk meyakinkan hakim-hakim Mahkamah Persekutuan bahawa hakim-hakim mahkamah bawahan adalah salah penafsiran mereka akan limb kedua seksyen 6(3) Akta Had Masa, manakala peguam Responden hanya perlu mengesahkan tafsiran yang telahpun dibuat oleh hakim-hakim mahkamah bawahan.

Di dalam tindakan ini, saya tidak menafikan bahawa kedua-dua pihak Responden dan Perayu, perlu membuat kajian dan penyelidikan yang agak mendalam bagi menegakkan kes mereka tetapi seperti yang saya katakan tadi ianya merupakan isu penafsiran undang-undang sahaja dan beban yang besar terletak di bahu pihak Perayu dan bukannya pada Responden.

Atas alasan-alasan di atas dan setelah menimbangkan undang-undang mengenai taksiran bagi kos getting up saya berpendapat RM35,000.00 adalah satu jumlah yang berpatutan dan menasabah.

[4] On an application for review under O. 59 r. 36(5) of the RHC the judge may make such order as the circumstances require. By its terms the provision confers on the judge a discretion. But the discretion is not unfettered. It must be exercised judicially. The judge should not interfere with the taxing registrar's decision unless there is an error of principle or some other material error (*Diversey (Far East) Pte Ltd v. Chai Chung Ching Chester & Ors (No. 2)* [1993] 1 SLR 542; *Chan Kok Choon JP v. MBF Finance Bhd* [2000] 4 CLJ 453) or the quantum allowed is obviously wrong (*Starlite Ceramic Industry Ltd. v. Hiap Huat Pottery* [1973] 1

A MLJ 146) or the registrar has exercised his discretion capriciously or mischievously: *Corbett v. Ipoh Tin Dredging Ltd* [1936] MLJ 222 at p 224; see also *Malaysian High Court Practice*, 2001 Desk Edition 1 p 1933. Generally speaking, the discretion of the registrar on taxation is final (see judgment of Sir John Leach, MR B in *Alsop v. Oxford (Lord)* [1833] 1 My. & K. 564, which was quoted with approval by Abdul Malek Ahmad FCJ (as he then was) in *Gooi Hock Seng v. Chuah Guat Khim* [2001] 1 CLJ 583; see also *Lloyds Bank plc v. Ang Cheng Ho Quarry & Ors* [1993] 2 CLJ 210 where Chong Siew Fai J (as he then was) held that C generally speaking the discretion of the taxing officer on quantum will not be interfered with).

[5] In *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* [2002] 4 CLJ 259 a similar application was made by the D respondents to the judge in chambers for a review of the deputy registrar's decision in awarding RM40,000 for the getting-up fee regarding the appeal in the Federal Court. The respondents argued that the said amount was manifestly low. Abdul Malek Ahmad FCJ (as he then was) in affirming the award held:

E

> Since the review was only as regards the quantum of costs for getting-up, it should not be changed unless there was an error of principle on the part of the taxing registrar in fixing the amount. In the present matter, the major preparations by counsel would have been at the High Court level and since the taxing party was F successful at both the High Court and the Court of Appeal, there was little for them to prepare in relation to the Federal Court appeal. As such, the quantum for RM40,000 was confirmed.

[6] The case of *Kerajaan Negeri Johor, supra,* is not dissimilar to the present case, which is a review against quantum, namely, that G the getting-up fee was inadequate. It is to be noted that the respondent had initially requested RM250,000 as the getting-up fee before the taxing registrar, but for the reasons stated in her decision, she awarded only RM35,000.

H **[7]** In my view, she was correct. The learned registrar gave her grounds for awarding the sum of RM35,000 as getting-up fee and to my mind, the registrar had applied the correct principles in arriving at that figure. The sum awarded was not manifestly low and out of proportion to the complexity and novelty of the

I

question posed. It would not be just to the appellant to be further burdened with extra costs if the quantum is increased as the appellant could not now recover the judgment debt from the respondent.

[8] In the present case, the bulk of the preparation by counsel would have been at the High Court and the Court of Appeal levels. And since the taxing respondent was successful at both the courts there was little for the respondent to prepare in relation to the appeal in the Federal Court.

[9] Further, the respondent's application for review did not involve any error of principle on the part of the registrar. Indeed, it was a review against inadequacy of quantum. As such, the amount of RM35,000 awarded by the learned registrar for getting-up fee is fair and reasonable. There is no justification for me to interfere with her decision.

[10] Accordingly, the application for review was dismissed.